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COUNTY SHERIFF'S DEPARTMENT, and D. FOSTER

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THERESA LOUISE PASSINEAU,

Case No. C 07-05681 JW

Plaintiff,

v.

MONTEREY COUNTY DEPARTMENT OF  
SOCIAL AND EMPLOYMENT SERVICES,  
ET AL.,

Defendants.

MONTEREY COUNTY DEFENDANTS  
STEVE MUDD, PAT MANNION AND D.  
FOSTER, MONTEREY COUNTY  
DEPARTMENT OF SOCIAL &  
EMPLOYMENT SERVICES AND  
MONTEREY COUNTY SHERIFF'S  
OFFICE'S REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS COMPLAINT  
AND MOTION FOR A MORE DEFINITE  
STATEMENT

**I.**

**PLAINTIFF'S OPPOSITION FAILS TO EXPLAIN THE VAGUE AND AMBIGUOUS**

**NATURE OF THE COMPLAINT.**

Plaintiff's Opposition to Defendants' 12(b)(6) Motion sets out a string of citations which  
commonly called for a set of "facts alleged"; "sufficient facts alleged"; "well pleaded factual  
allegations"; a "set of facts", Complaint page 3, lines 21-26. Defendants again challenge the Complaint  
in failing to assert sufficient factual allegations so as to give notice of Defendants' wrong doing.

///

1 Plaintiff's opposition as to Defendant Mannion is that she is named in the caption; and that  
 2 Count Two of the Complaint incorporates all previous allegations by reference, Complaint page 6, lines  
 3 16-22. Naming a defendant in the caption provides no notice of liability. Count Two fails to allege any  
 4 facts as to Mannion. In fact the incorporated by reference paragraphs are devoted to the removal of the  
 5 minors, and then go on to assert that Santa Cruz County immediate took over of the case for the alleged  
 6 11-month period. No facts general or otherwise are alleged or directed towards Defendant Mannion,  
 7 who was not involved in the removal, and is not an employee of Santa Cruz County.

8 While Plaintiff does allege that social workers investigating the case repeatedly advised Plaintiff  
 9 that she could never effect reunification with her children unless she left her husband, and they faulted  
 10 her progress for not verbalizing explicit belief in the allegations of the boys, Plaintiff's Opposition page  
 11 6. lines 23-26, nothing is alleged as to Defendant Mannion. Moreover, Santa Cruz County conducted  
 12 the dependency case, not Monterey County.

## 13 II.

### 14 **PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO CONCLUDE THAT** 15 **DEFENDANTS FOSTER OR MUDD ACTED WITHOUT PROBABLE CAUSE.**

16 At page 8 and ff Plaintiff argues that she has sufficiently alleged that Defendant Foster acted  
 17 without probable cause. Plaintiff relies heavy on *Rogers v. County of San Joaquin* (9<sup>th</sup> Cir. 2007) 487  
 18 F.3d. 1288.

19 The facts of Rogers do not describe the present matter. Rogers is not a sexual abuse case. In  
 20 Rogers the minor children were found to be malnourished, had rotten teeth, and the home was dirty and  
 21 in disarray. Otherwise the children were alert and active. Immediate medical attention was not  
 22 considered necessary to cure the bottle rot or malnutrition conditions, *Rogers*, 487 F.3d 1288, 1295.

23 In addition, upon the initial report of child neglect received by San Joaquin County Protective  
 24 Services, the intake unit did not view the report as requiring an emergency response. In fact a second  
 25 report came in and intake assigned it to a ten-day response, *Rogers*, 487 F.3D 1288, 1291. Lastly, the  
 26 social worker conceded she could have obtained a warrant within hours and failed to assert that she  
 27 believed the medical conditions would have worsened if she delayed in taking at least one minor into  
 28 custody in order to obtain a warrant.

1 Plaintiff fails to challenge or question Defendant Foster's or Mudd's actions. Herein there are no  
 2 assertions that the Plaintiff gave any credit to or concern over the serious allegations made by both  
 3 minors when confirmed by Defendants Foster and Mudd. Mr. Passineau, accused of the abuse, was still  
 4 living in the home with all six minors. Plaintiff has not plead that Mr. Passineau would be separated  
 5 from or kept from contacting the minors. The Dependency Judge's comments at the Dependency  
 6 hearing which Plaintiff cites within the Complaint, page 17, lines 2-7 are relevant as to the question of  
 7 how serious the minors' situation would appear at the time of the removal to a reasonable social worker.  
 8 *Baker v. Racansky* (9<sup>th</sup> Cir. 1989) 887 F.2d 183, 185 N.I. There the judge is quoted as saying:

9 At the hearing on July 15<sup>th</sup>, the presiding judge volunteered the  
 10 following excoriation to Plaintiff's husband, as Plaintiff recalls it:  
 11 "To bring a boy who had already been sexually abused into your  
 12 home to protect and nurture him, and then to sexually abuse him  
 13 again is despicable!" Then, turning to Plaintiff, the judge  
 14 remarked: "If I were the mother, I would have kicked the husband  
 15 out two seconds after I heard about this." (Complaint, ¶ 17.)

16 In all Plaintiff has failed to assert sufficient facts to even suggest that the minors were not in  
 17 immediate danger. Viewing the complaint favorably to the Plaintiff, there is (are) no allegation(s) of  
 18 fact(s) that Defendant Foster or Defendant Mudd were provided with such information by the home visit  
 19 that would allow them to reasonably predict that if the minor females were left in their home they would  
 20 be safe. Rather it is reasonable to suspect that Mr. Passineau might well confront the minors, try to  
 21 convince them not to speak, that he may have abused them as well, or that Plaintiff would voluntarily  
 22 agree to keep the children isolated from Mr. Passineau, and be successful in doing so.

### 23 III.

#### 24 **PLAINTIFF HAS FAILED TO PROPERLY PLEAD A 1983 VIOLATION AS TO** 25 **MONTEREY COUNTY DEFENDANTS.**

26 Plaintiff argues that she has sufficiently plead a section 1983 violation as to Monterey County  
 27 Defendants. Plaintiff's argument is based largely upon one of the three ways to show policy or custom  
 28 municipality rendering it liable for such violations that Plaintiff cites to, namely "2) by showing that the

1 decision-making official was, as a matter of law, a final policymaking authority whose edits or acts may  
 2 fairly be said to represent official policy in the area of decision.” Plaintiff cites *Rosenbaum v. City &*  
 3 *County of San Francisco* (9<sup>th</sup> Cir. 2007) 484 F.3d 1142, 1155. (Plaintiff’s Opposition page 9, line 28 -  
 4 page 10, line 2.) Plaintiff further concludes, “Thus, Plaintiff’s Complaint meets the requirements of the  
 5 second method of proof set forth above,” Plaintiff’s Opposition, page 10, lines 7-8. Plaintiff then singles  
 6 out the presiding judge in the juvenile dependency proceeding as the policy maker.

7 Simply put a superior court judge does not make department policy and is not a county employee  
 8 or officer. A superior court judge is chosen in Monterey County at a general election (Cal. Const., Art.  
 9 VI, section 16(b)). Judicial conduct is prescribed in The Code of Judicial Ethics created by the  
 10 California Supreme Court, (Cal. Const. Art. VI, section 18(m)). The ethical rules are contained within 6  
 11 Canons. For example,

12 Canon 1 states: “A judge shall uphold the integrity and independence of the judiciary.”

13 Canon 3 states: “A judge shall perform the duties of judicial office impartially and  
 14 diligently.”

15 Canon 3B in part sets forth:

16 Canon 3B(2): Be faithful to the law, “regardless of partisan interests, public clamor or  
 17 fear of criticism”; maintain professional competence.

18 Canon 3B(7): Accord a full right to be heard to every person having a legal interest in the  
 19 proceeding, but refrain from initiating, permitting or considering ex parte  
 20 communications except as authorized.

21 Canon 3B(8): Dispose of all judicial matters fairly, promptly, and efficiently.

22 Further Cal. Gov’t Code 24000 enumerates county officers. The list does not include superior  
 23 court judges.

24 A superior court judge does not make official or unofficial policy for an individual county  
 25 department and in particular as to the official policy to be followed by Defendants Mannion, Mudd or  
 26 Foster.

27 Again, Plaintiff’s opposition merely further underlies the fact that what Plaintiff has alleged if  
 28 anything, are the actions of one or two individuals, and is allegedly reflective of certain individual

1 Defendant choices and not the basis upon or reflective of county or department wide policy, official or  
2 unofficial.

3 IV.

4 **DEFENDANTS' SUPPLEMENTAL STATEMENT, RAISING THE ROOKER-FELDMAN**  
5 **AND ABSTENTION ISSUES IS TIMELY.**

6 At Plaintiff's Complaint, pages 4-5 Plaintiff argues that Defendants' Supplemental Statement  
7 filed on or about February 6, 2008, was not filed in a timely fashion (Opposition, pages 4-5). In this  
8 regard Defendants note that the court on its own may raise these same concerns. *Frederiksen v. City of*  
9 *Lockport* 384 F.3D 437, 438 (7<sup>TH</sup> Cir. 2004); *Worldwide Church of God v. McNair* 805 F.2d 888, 890  
10 (9<sup>th</sup> Cir. 1986). Plaintiff also attacks the issue by stating that Defendants failed to request that the court  
11 take judicial notice of the hearings conducted within the Dependency case. Defendants believe it is  
12 sufficient that the court take notice that the Dependency case was litigated, which Plaintiff admits to in  
13 the Complaint. In other words, Plaintiff had a full opportunity to initiate her rights within the  
14 Dependency proceedings. In addition this issue arose as noted in Defendants' Supplemental Statement,  
15 from the face-to-face meeting with Plaintiff's counsel in early February 2008. Nevertheless Defendants  
16 are not opposed to allowing Plaintiffs additional time to respond to the issues raised in this regard,  
17 Defendants reserving time to reply.

18 V.

19 **DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE GRANTED.**

20 The present Complaint is vague and ambiguous as to individual County Defendants as well as  
21 Defendants County of Monterey and The Monterey County Department of Social & Employment  
22 Services. No specific wrongful acts are attributed to Defendant Mannion. The Complaint lacks any  
23 allegations that Defendants Mudd and Foster's actions to remove the minor were not reasonable or for  
24 lack of exigent circumstances. Plaintiff objects because such was done without a warrant, but fails to  
25 assert factually, why a warrant should have been first obtained, and why either Defendants' belief of  
26 immediate harm, at the time, was not reasonable. Plaintiff fails to demonstrate that the action of any  
27 Monterey County Defendant was done in regard to a policy as required in *Monell v. Department of*  
28 *Social Services* (1978) 436 U.S. 658, 691-694. In such instances Federal Rules of Civil Procedure Rule

1 12(e) provides that a party such as Defendants may move for a more definite statement. Therefore, the  
2 court should order Plaintiff to file a more definite statement.

3 **VI.**

4 **CONCLUSION**

5 Based on the above, Defendants request that the court dismiss the Complaint. If the court is  
6 inclined not to so act, then it should dismiss the present complaint and order Plaintiff to file an amended  
7 complaint asserting specific allegations as to each Monterey County Defendant.

8  
9 DATED: February 25, 2008.

Respectfully submitted,

10 CHARLES J. McKEE, County Counsel

11  
12 By /S/ Irven L. Grant  
13 IRVEN L. GRANT, Deputy County Counsel

14 Attorneys for Defendants MONTEREY COUNTY  
15 DEPARTMENT OF SOCIAL & EMPLOYMENT  
16 SERVICES, STEVE MUDD, PAT MANNION,  
MONTEREY COUNTY SHERIFF'S DEPARTMENT, and  
D. FOSTER

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